No. 87-168

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

Russell Frisby, et al.,

Appellants,

v.

Sandra C. Schultz, et al.,

Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

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APPELLANTS' REPLY BRIEF

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

Wisconsin Statutes § 340.01(22) provides in pertinent part (defining a highway, inclu-

ding a street): "every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads . . . opened to the use of the public for the purpose of vehicular travel."

ARGUMENT

This case presents the Court with the question of whether a municipality as an exercise of its police power to protect the safety and privacy of its residents, may prohibit picketing in residential areas. This question was expressly left open by the Court in Carey v. Brown, 447 U.S. 455, 459 n. 2 (1980). The Town of Brookfield, Wisconsin (the "Town") determined that the expressive activity involved, picketing, is incompatible with the forum, narrow residential streets without sidewalks. In doing so the Town was required to balance two constitutionally protected rights, privacy and freedom of speech. The Town respectfully submits that its residential picketing ordinance is a constitutional restriction of speech.

I. This Court has Appellate Jurisdiction.

The Seventh Circuit Court of Appeals affirmed, without opinion, the district court's order of a preliminary injunction enjoining the enforcement of Brookfield's residential picketing ordinance, Schultz v. Frisby, 818 F.2d 33 (7th Cir. 1987), aff'g, 619 F. Supp. 792, 798 (E.D. Wis. 1985)(Jurisdictional Statement at A-1 and A-22). The district court determined that the appellees ("the picketers") were likely to succeed on the merits of their constitutional claims (Jurisdictional Statement at A-17 to A-15). When the court of appeals affirmed, therefore, it necessarily held that the ordinance was unconstitutional. This Court therefore has appellate jurisdiction under 28 U.S.C. § 1254(2).

This case arises in a factual vacuum; the picketers picketed only before the Brookfield ordinance became effective. The ordinance has never been enforced or administered, thus all the facts considered by the district court

relate to events that occurred prior to adoption of the ordinance. Those facts are not seriously in dispute. The court therefore addressed only the legal issue of the constitutionality of the ordinance (see Jurisdictional Statement at A-14 to A-15), and that is the only issue that could be addressed if there was a trial. Based on its conclusion that the ordinance was unconstitutional, the district court ordered a temporary injunction that would become permanent if the Town did not appeal and neither party requested a trial (Id. at A-23). The court apparently felt no need to review additional facts in order to make a final decision in the case.

Because the district court rested its decision solely on the grounds that the picketers were likely to succeed on their constitutional argument (see id. at A-14 to A-15), that is the only grounds on which the court of appeals could have affirmed. Even if the court of appeals "decided [nothing] more than that the district court did not abuse its

discretion by granting preliminary injunctive relief," as appellees allege (Brief for Appellees at 10), that decision necessarily rested on the court of appeals' conclusion that the ordinance was unconstitutional. If the court of appeals had determined instead that the district court erred in interpreting or applying the law, the court of appeals would have held the district court abused its discretion. Thus the requirement of Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), that jurisdiction under 28 U.S.C. § 1254(2) is properly invoked if a "court of appeals squarely has 'held' that a state statute is unconstitutional on its face or as applied; [and that] jurisdiction does not lie if the decision might rest on other grounds," is met. See id. at 470 n. 12 (citation omitted). Thus the court of appeals' decision was final and plenary review is proper.

If the Court determines instead that the correct standard of review is whether the district court abused its discretion in grant-

ing the preliminary injunction, this appeal still is proper. The district court applied the criteria for granting a preliminary injunction and determined that one criterion, whether the picketers were reasonably likely to succeed on the merits, was met (Jurisdictional Statement at A-14 to A-15). The "merits" of this case consist solely of the question of whether or not the ordinance is constitutional. Because the ordinance <u>is</u> constitutional, the picketers did not have a reasonable likelihood of success on the merits, and the district court abused its discretion in ordering the preliminary injunction. Thus even if, as appellees assert "[t]he only question now before this Court is whether the district court properly granted preliminary injunctive relief" (Brief for Appellees at 11), the Court has appellate jurisdiction over the case.

Finally, the Town requested a trial on the issue of a permanent injunction, but did

so only to protect its rights. The district court's order states that:

> [I]f the defendants do not appeal and the court does not receive within sixty days from the filing date of this order a request in writing from either party for a trial on the plaintiffs' request for a permanent injunction, the preliminary injunction issued today will become permanent, and judgment will be entered in favor of the plaintiffs and against the defendants without further notice from the court.

(Jurisdictional Statement at A-23)(emphasis added). Thus in order to preserve its right to appeal, the Town also requested a trial.

II. The Residential Picketing Ordinance is a Legitimate Exercise of the Town's Police Power.

The Tenth Amendment to the Constitution reserves to states and their subdivisions the powers not otherwise delegated to the federal government. Local governments' police power under the Tenth Amendment includes the power to enact ordinances to promote public welfare. See Berman v. Parker, 348 U.S. 26, 33-34 (1954). The Town of Brookfield made the de-

termination that a residential picketing ordinance promoted the public welfare (see Town of Brookfield General Code § 9.17, Jurisdictional Statement at A-26 to A-27). That determination required that the Town balance two constitutionally guaranteed rights: privacy and freedom of speech. The Town attempted to achieve this balance by restricting the least amount of speech while still protecting privacy. Thus the ordinance only prohibits picketing and only in residential areas. Other forms of expressive activity are allowed in residential areas and picketing, plus other forms of expressive activity, are allowed in nonresidential areas.

"The right to communication is not limitless." Carey v. Brown, 447 U.S. 455, 470 (1980). Expressive activity may be limited in a public forum by a narrowly tailored, content-neutral ordinance designed to advance a significant governmental interest, that leaves open ample alternative channels of communication, Perry Education Ass'n v. Perry Local

Educators' Ass'n, 460 U.S. 37, 45 (1983), or in a nonpublic forum by a reasonable ordinance that is not an effort to suppress expression just because public officials oppose the speakers' views, Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 806 (1985). This Court has allowed local governments to restrict expression in a variety of circumstances. See, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (regulation to prevent sleeping in tents in Lafayette Park); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (ordinance prohibiting posting of signs on public property); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981)(rule allowing sale or distribution of any merchandise, including printed material, only from licensed locations); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (statute permitting resident to have his name removed from mailing lists); Cox v. Louisiana, 379 U.S. 559 (1965)(statute prohibiting pick-

eting and parading in or near courthouses); Breard v. City of Alexandria, 341 U.S. 622 (1951) (ordinance regulating door-to-door magazine solicitations at private residences); Kovacs v. Cooper, 336 U.S. 77 (1949)(ordinance prohibiting the use of sound trucks emitting "loud and raucous noises"). Even residential picketing is not "beyond the reach of uniform and nondiscriminatory regulation." Carey v. Brown, 447 U.S. at 470 (1980).

Although the Constitution does not explicitly mention the right of privacy, this Court has recognized the existence of that right under the Constitution since perhaps as early 1891. See Roe v. Wade, 410 U.S. 113, 152 (1973), and cases cited therein. The Court has described the right of privacy as a penumbra right derived from the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484-855 (1965); it therefore is not one of the lesser constitutional rights.

Residential districts can be seen as sanctuaries for privacy. The late Justice

Douglas, writing for the majority of the Court in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), stated:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissable one within Berman v. Parker, supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9 (emphasis added). The case of City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), which like Belle Terre was a zoning case, further establishes that residential areas are sanctuaries for privacy. There the Court stated that "a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." Id. at 50 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976)). The Court upheld an ordinance that prevented adult theaters from locating within 1000 feet of a residential area, church, park or school, even

though that left only approximately five percent of the land area of the city available for adult theaters, stating that the ordinance was a valid way for the city to preserve the quality of life in the community at large. Id. at 54.

Brookfield's residential property ordinance is a further example of a municipality attempting to preserve a sanctuary of privacy in its residential neighborhoods. While some expressive activity admittedly is curtailed by the ordinance, the ordinance is nevertheless a valid exercise of Brookfield's police power, because it meets the requirements of a constitutional regulation of speech.

III. Not all Streets are Full Public Fora for First Amendment Activities.

There are dicta in a number of cases that all streets are full public fora for First Amendment activities. See, e.g., Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 802 (1985); Perry Education Ass'n v. Perry Local Educators' Ass'n, 460

U.S. 37, 45 (1983). Labelling a forum as "public" leads to application of the Perry standard to determine whether a regulation is a constitutional time, place and manner restriction on speech. The Town respectfully submits that these dicta are unrealistic because streets vary greatly in their characteristics. Some streets, like those in Brookfield, are as narrow as thirty feet and without sidewalks. Other streets are as wide as the major arteries of the interstate highway system, which also are without sidewalks. In between these two extremes are the downtown streets of Skokie, Illinois, and similar streets. Because of streets' different characteristics, applying the Perry standard to all streets is not appropriate.

The character of the property at issue must be considered when determining the "existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated. . . ." Perry, 460 U.S. at 44. While the Nazis, under color

of the First Amendment, may parade through downtown Skokie, Illinois, see Collin v. Smith, 578 F.2d 1197 (7th Cir.) cert. denied, 439 U.S. 916 (1978), it is a giant leap from that proposition to the proposition that the Village of Skokie is prevented by the First Amendment from prohibiting the Nazis or anyone else from picketing in front of the home of a local leader of the Jewish community to harass him, his family and his neighbors at his residence.

No matter whether a forum is labeled "public" or "nonpublic," First Amendment analysis ultimately must focus upon whether the expressive activity is "basically incompatible" with the forum. See Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). The forum here is a residential neighborhood of single family homes (Jurisdictional Statement at A-6). The streets are thirty feet wide, with no sidewalks (id.). The expressive activity that is proscribed by the ordinance is picketing, generally understood to be standing or

patrolling in front of a particular place. Picketing is incompatible with both the use of Brookfield's residential streets for vehicular traffic and the general character of its residential neighborhoods.

Brookfield's residential streets were designed primarily for vehicular travel. See Wis. Stat. § 340.01(22). Picketing on these narrow streets will impede the purpose for which they exist--vehicular travel. In addition, picketers create a safety hazard, both to themselves and to other pedestrians, as vehicles attempt to use the streets. If cars and buses are parked on the street the danger will be even greater, because of decreased visibility for drivers.

Picketing is more dangerous, and therefore less compatible with the nature of the streets, than various other pedestrian activities. A parade or march would keep moving, rather than remain in front of one residence, so any danger would be more short-lived. In addition, a parade or march would require

advance notice to the Town, so police protection could be planned for and provided. Individual pedestrians also would create less of a danger than a group of picketers or individual picketers. People walking or jogging on the street would move out of the area, rather than remain in one place.

As well as being incompatible with the nature and purpose of the residential streets in Brookfield, picketing also is incompatible with the residential nature of the neighborhood. This Court stated in Grayned that "[t]he initial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." 408 U.S. at 118 (emphasis added). According to Judge Coffey in his dissent in the vacated Schultz v. Frisby Seventh Circuit decision, "[t]he presence of picketers lurking outside one's home, threatening the very peace and tranquility and security that constitutes a most significant part of the right to privacy, can never be

considered as being compatible with the normal activities of a private residential neighborhood." 807 F.2d 1339, 1366 (7th Cir. 1986) (Coffey, J., dissenting)(JA-186 to JA-187). The home has been called the "last citadel of the tired, the weary, and the sick." Gregory v. City of Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring). A group of picketers, or even a single picket, is not compatible with the private nature of the homes in Brookfield's residential neighborhoods.

IV. The Residential Picketing Ordinance does not Contain an Implied Labor Exception.

This court in Carey v. Brown, 447 U.S. 455 (1980), left open the question of ". . . whether a statute banning all residential picketing regardless of its subject matter would violate the First and Fourteenth Amendments." Id. at 459 n. 2. This case squarely presents that question. The district court determined that the Brookfield residential picketing ordinance did not violate the equal protection clause of the Fourteenth Amendment

when it refused to read an implied exception to labor picketing into the ordinance and held the ordinance was content neutral (see Jurisdictional Statement at A-17). Appellees argue that a state statute exempts labor picketing from the ordinance and that the ordinance therefore violates equal protection (Brief for Appellees at 17-26). However, this Court "rarely reviews a construction of state law agreed upon by the two lower federal courts." Virginia v. American Booksellers Ass'n, ___ U.S. ___, 108 S. Ct. 636, 643 (1988); see Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 499-500 (1985), and cases cited therein. The district court did not construe the state labor statute to require that labor picketing be allowed under the Brookfield ordinance, and noted that the legislative history of the ordinance showed a "precisely contrary intent" (Jurisdictional Statement at A-17). The court of appeals affirmed the district court's judgment, albeit without opinion (id. at A-1).

In the event that this Court believes that the state statute applies, it should be noted that the Wisconsin Supreme Court has construed an express labor exception in a residential picketing ordinance as ensuring equal protection in City of Wauwatosa v. King, 49 Wis. 2d 398, 182 N.W.2d 530 (1971). The court there stated:

> The apparent legislative intent is to protect the home or residence as a home and residence, and permit picketing of a place of employment regardless of whether or not it is located in a residential property. Where the householder makes his home or residence a place of employment for someone else, for as long as it is such place of employment, he waives the protection of the ordinance as to disputes related to such fact and place of employment. Where a householder employs a maid or building service workers, in the event of dispute, the only place such employees could exercise the right to picket, that would have any relatedness to the controversy, is where they were employed. Where a homeowner employs a carpenter, painter or electrician to repair or remodel the premises, as to any employment-related dispute, the place of employment is the only possible focus for picket activity. Where an employer lives above the store or tavern, or operates and maintains his business out of his residence, as to his employees in

any labor-related dispute, the place of business is the only focus or target at which picketing could be meaningfully directed. Where the home is, temporarily or permanently a place of employment, to take from those involved in an employment-related or labor dispute the right to picket at the place of their employment would leave them no place to picket such employer. Since there would be no reasonable alternative place available in such dispute as to such employment, the ban on picketing a home-place of employment would very nearly be a ban on picketing the employer at all. We view the exception not as denying, but as assuring, equal protection by limiting the ban on picketing the home to picketing of it as a place of employment whenever it is also that.

Id. at 413-414, 182 N.W.2d at 538 (emphasis added), contra, Carey v. Brown, 447 U.S. at 468-69. As Justice Rehnquist has stated, "[i]t is far from nonsensical or arbitrary for a legislature to conclude that privacy interests are reduced when the residence is used for these other [nonresidential] purposes." Id. at 483 (Rehnquist, J., dissenting). Appellants respectfully submit that this Court should adopt the rationale of the Wisconsin

Supreme Court as the appropriate construction of a Wisconsin ordinance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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